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No. 03-72

IN THE

Supreme Court of the United States

GARY G. SHARPE, *et al.*,

Petitioners,

v.

BRUCE CURETON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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19 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	iii
Reasons for Denying the Petition	1
I. Neither The Record Nor The Decision Below Raise The Questions Presented By The Petitioner	2
II. Petitioners' Claim Of Powerless Federal Courts Is Completely Devoid Of Merit And Should Be Denied	4
III. Petitioners' Claim That Rule 68 Defeats The Congressional Intent Of Using 42 U.S.C. § 1988 To Encourage Private Citizens To Join In The Effort To Preserve Fundamental Rights Should Be Denied And Further Indicates A Complete Lack Of Understanding Of Federal Rule Of Civil Procedure 68	7
IV. Petitioners' Argument In Favor Of The Application Of The Continuing Violations Doctrine Is Without Merit	10
V. The Sixth Circuit Ruling Does Not Conflict With *Elrod v. Burns*	12

Contents

Page

VI. This Case Does Not Have Far Reaching Implications Or Present Unsettled Questions Of Federal Law 13

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Berndt v. State of Tennessee, 796 F.2d 879 (6th Cir. 1986) 10

Califano v. Yamasaki, 442 U.S. 682 (1979) 5

Elrod v. Burns, 427 U.S. 347 (1976) 1, 12

Gavoni v. Dobbs House, Inc., 164 F.3d 1071 (7th Cir. 1999) 9

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) 11

Hopper v. Euclid Manor Nursing Home, Inc., 867 F.2d 291 (6th Cir. 1989) 8, 9

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) 5, 6

Mallory v. Eyrich, 922 F.2d 1273 (6th Cir. 1991) .. 8

Marek v. Chesny, 473 U.S. 1 (1985) 8, 9

National Railroad Passenger Corp. v. Morgan, 122 S. Ct. 2061 (2002) 10, 11, 12

Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984) 10

Cited Authorities

Page

Sherman v. Chrysler Corp. No. 00-2287, 2002 WL 31074591 (6th Cir., Sep. 16, 2002) 12

Wilson v. Garcia, 471 U.S. 261 (1985) 10

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 11

Statute:

42 U.S.C. § 1983 ..... 8, 12

42 U.S.C. § 1988 7

Rules:

Fed. R. Civ. P. 23 2

Fed. R. Civ. P. 23(b) 2

Fed. R. Civ. P. 23(c) 2

Fed. R. Civ. P. 68 ..... *passim*

Other Authority:

Tenn. Code Ann. § 28-3-104(a)(3) 10

REASONS FOR DENYING THE PETITION

The questions framed by the Petition are merely presented in a fashion to incite and inflame passion rather than to present substantive issues for appeal. The issue as to the continuing pattern of violations is raised to determine whether Petitioners' filing of the Complaint, after the expiration of the statute of limitations, can be used as stated by the Sixth Circuit as an ". . . effort to sidestep the one year Tennessee statute of limitations. . . ." (Pet., App. A at 13a). The Sixth Circuit cited and followed this Court's rulings as to continuing violations when it affirmed the trial court's dismissal of a portion of Petitioners' claims by holding that the claims were barred by the statute of limitations and that the continuing violation doctrine did not apply to the facts of this case.

As to the Petitioners' assertions that the Rule 68 offers made by Defendants on December 6, 1996 were vague and ambiguous, the Sixth Circuit properly found that the Rule 68 offers were not void for vagueness and were made in accordance with the requirements of Rule 68 of the Federal Rules of Civil Procedure. The Sixth Circuit clearly saw Petitioners' flawed argument for what it is – an attempt to escape Rule 68 consequences for having overvalued their case. Petitioners did not accept the clear and unambiguous offers, and they are not entitled to attorney fees from and after the date of the offers.

Neither the Sixth Circuit's actual ruling nor the record below support the argument raised by the Petition that the federal courts are somehow powerless in cases of this nature. The rulings by the Sixth Circuit and the trial court are not in conflict with *Elrod v. Burns*, 427 U.S. 347 (1976), despite

Petitioners' fife and drum appeal to emotion. Petitioners even attempt to sustain such an emotional appeal by filing Appendixes E and F to their Petition which include new allegations neither pled nor admitted into evidence as a part of the trial in this case. (Pet., App. E and F). The argument raised by Petitioners is merely an attempt to incite rather than recite the actual facts and law of this case.

Petitioners' conclusory assertions that the federal courts are powerless and that Rule 68 is applied unreasonably indicate that this Petition has no far reaching implications. Basically, Petitioners make appeals to passion and prejudice to continue a lawsuit, a large part of which has been barred by the statute of limitations from the outset, in order to otherwise recover attorney fees properly disallowed by the Sixth Circuit on account of Petitioners' failure to accept clear and unambiguous Rule 68 offers. The Sixth Circuit's ruling was proper in all respects. The Respondents respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari.

I.

NEITHER THE RECORD NOR THE DECISION BELOW RAISE THE QUESTIONS PRESENTED BY THE PETITIONER

Petitioners' original Complaint was for five (5) individual firefighters. The case was tried as to the individual cases of each firefighter. No class action suit was filed nor was there a certification of a class, although Petitioners refer to a class action (Pet. at 8) and to class representation (Pet. at 9). Petitioners failed to allege a class action (Fed. R. Civ. P. 23) or to seek class certification (Fed. R. Civ. P. 23(b) and (c)) in any original or amended pleading. They cannot at this late date seek to add a

class action to a lawsuit after the trial of a case. This argument was made after the trial of the present case and presented to the appellate court. The Sixth Circuit dealt with the issue by finding, "Here the plaintiffs do not represent a class, and have otherwise failed to allege class-wide discriminatory action." (Pet., App. A at 18a).

The contents of Appendixes E and F cannot even be found in the original trial record in this case, considering that such matters post date the trial, and should be stricken from the Petition. The Sixth Circuit in FN 15 denied plaintiff's motion to consider newly emerged facts not considered by the Court. (Pet., App. A at 30a). Yet Appendixes E and F are the very items as were previously excluded. The Petition on pages 8, 9, 10, and 13 refer to matters not in the original record. Petitioners' references to Fireman Crisp (Pet. at 5) were not a part of the record in this case and should be disregarded.

Petitioners' claim that federal courts are powerless is never referred to in either the trial or appellate record. This case was tried, appealed and decided. The Petitioners do not like the opinions handed down by the Sixth Circuit, but they have failed to articulate any reasonable argument, supported by applicable law, to justify their claims. (Pet., App. A).

II.

PETITIONERS' CLAIM OF POWERLESS FEDERAL COURTS IS COMPLETELY DEVOID OF MERIT AND SHOULD BE DENIED

The absurdity of this claim renders a response almost unnecessary. A review of the Sixth Circuit Opinion clearly shows Petitioners' claim that the Sixth Circuit acted contrary to precedents of this Court is devoid of any merit whatsoever. To say a federal court is powerless to enforce a law when Petitioners fail to comply with the requirements to timely file their lawsuit or seek class certification is a shameful assault on the federal judiciary in an attempt to blame someone else for one's own failures. The Sixth Circuit affirmed the District Court's decision regarding findings as to the transfer claims. It was the District Court that dismissed Petitioners' claims for failure to comply with the statute of limitations, and the Sixth Circuit upheld the trial court's dismissal. The Sixth Circuit found that a permanent injunction was inappropriate because Petitioners had failed to demonstrate the likelihood of future harm or that any harm would be irreparable. The class action issue was never raised in the original trial or in the record. To contend that the Sixth Circuit and other federal courts are powerless to remedy properly asserted and timely perfected constitutional questions is disingenuous and truly offensive when one considers that such claim is made in this case in the context of Petitioners' own failures to timely file and frame their lawsuit.

Petitioners claims for injunctive relief and class wide relief lack merit. The Sixth Circuit found and the record supports that the Petitioners, ". . . never sought nor received

class certification." (Pet. App. A at 28a). The Court cited and properly relied upon *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) as the basis for holding that the injunction of the trial court was overly broad.

Further, with respect to the issuance of a permanent injunction, the Sixth Circuit correctly found that the District Court's initial decision not to grant a permanent injunction against the Defendant Ashe was the proper course.

Despite their inflammatory rhetoric, Petitioners have failed even to address the Sixth Circuit's determination that the proof did not support the issuance of an injunction against Ashe. In reversing the District Court, the Sixth Circuit noted that a plaintiff in a civil rights case will only be entitled to a permanent injunction "upon showing 1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998). Further, injunctive relief should only issue "where the dilemma is ripe for judicial resolution, and 'a matter is considered premature for judicial review when the alleged injury is speculative or may never occur.'" (Pet., App. A at 27a) (citing *Kallstrom*, 136 F.3d at 1068).

The Sixth Circuit noted that, in this case, the District Court initially denied the Petitioners' request for a permanent injunction based, in part, upon the fact that Defendant Ashe cannot serve as Mayor beyond his current term, Defendant Cureton has retired as Fire Chief, and Defendant Pressley was not found to have violated the Petitioners' civil rights. (Pet., App. A at 27a). Further, the Petitioners were transferred back to their favored stations in August, 1996, during the pendency of their civil service grievances. *Id.* Only after the

Petitioners filed a motion to alter or amend did the District completely reverse course, without any additional evidence, and issue the permanent injunction. In analyzing the District Court's decision, the Sixth Circuit held:

> The district court correctly emphasized in its initial decision denying the injunction the lack of substantial likelihood of future injury given that: the firefighters were transferred back to their favored locations; Ashe was prohibited from seeking another term in office (and now has less than one year remaining in his last term), and Cureton is no longer available to carry out any retaliation orders due to his retirement. The district court's initial decision denying the injunction was correct.

(Pet., App. A at 30a). In addition to being overly broad, the Sixth Circuit found that an injunction was "unnecessary in any event because the firefighters have failed to establish a sufficient likelihood of future harm, and that any future harm would be irreparable." *Id.*

The Petitioners cannot dispute these facts and cannot disagree with the legal standard for the issuance of a permanent injunction as set out in *Kallstrom*. Indeed, there is no mention whatsoever of these facts in the Petition nor is there any discussion of the applicable legal standard. Therefore, instead of focusing upon the merits, the Petitioners accuse the Sixth Circuit of having an "unduly narrow view of the power of the District Court" and of failing to recognize "the fundamental importance of political freedom . . ." This unjustified attack on the court further evidences the absolute dearth of proof either that future harm is likely or that any future harm would be irreparable. (Pet., App. A at 30a).

III.

PETITIONERS' CLAIM THAT RULE 68 DEFEATS THE CONGRESSIONAL INTENT OF USING 42 U.S.C. § 1988 TO ENCOURAGE PRIVATE CITIZENS TO JOIN IN THE EFFORT TO PRESERVE FUNDAMENTAL RIGHTS SHOULD BE DENIED AND FURTHER INDICATES A COMPLETE LACK OF UNDERSTANDING OF FEDERAL RULE OF CIVIL PROCEDURE 68

Petitioners' assertion that using Rule 68 in a civil rights case defeats the fundamental rights of citizens has no merit.

Whereas Petitioners purport to support their request for Certiorari with self-righteous arguments regarding "our hard won freedoms," the reality of Petitioners' request concerns attorney fees. In this case, the Defendants made separate Rule 68 Offers to each of the five Petitioners on December 6, 1996, less than two months after the original lawsuit was filed. At that time, as now, Petitioners were all represented by the same counsel. None of the five Rule 68 Offers were accepted, and the case proceeded through discovery until it was ultimately tried to a jury in January and February, 2000. At the conclusion of a multi-day trial, the jury awarded a total of $30,645 against three of the four Defendants. This amount was later reduced to $16,001 by the District Court as a result of Petitioners failure to meet the applicable one-year statute of limitations for their 1995 transfer claims.

According to the Sixth Circuit's ruling, the Defendants' Rule 68 Offers were more favorable than this final judgment. Consequently, Petitioners' award of attorney fees was vacated and remanded to the District Court for a determination of the fees that had been earned as of the date of the original

Rule 68 Offers. Inasmuch as these offers were made so early in the litigation, it is unavoidable that the ultimate decision has a dramatic effect on the award of attorney fees, just as Rule 68 contemplates.

Federal Rule of Civil Procedure 68 provides that:

> A party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs accrued . . . If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the cost incurred after the making of the offer.

In a § 1983 action, Rule 68 costs include the plaintiffs' own attorney fees. Thus, when the Rule 68 offer is ultimately greater than the award, the plaintiff may not recover attorney fees from the defendant from the date such offer was made. *Marek v. Chesny*, 473 U.S. 1, 11 (1985); *Mallory v. Eyrich*, 922 F.2d 1273, 1278 (6th Cir. 1991). The Sixth Circuit considered the *Marek* opinion of this Court as well as earlier decisions of the Sixth Circuit and in its Opinion cited *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 (6th Cir. 1989). The Sixth Circuit held that the "operation of Rule 68 is mandatory and the District Court retains no discretion under Rule 68 to alter the Rule's sometimes severe application." In the present case, the original lawsuit was filed on the 24th day of October, 1996. The Defendants on December 6, 1996 made a timely Rule 68 Offer to each of the firefighters, which were not accepted. Again, on November 4, 1997, the Defendants made a second offer to each firefighter except for W. Potter, and those offers also

were not accepted. It is stated by the Sixth Circuit in the *Sharpe* Opinion, "Only the jury awards in favor of Scarbrough and F. Potter exceeded the sums specified in the offers, and when the district court subsequently eliminated the transfer claim recoveries on statute of limitation grounds, the Rule 68 offers to each individual plaintiff exceeded each individual jury award." (Pet., App. A at 31a).

The Sixth Circuit in reviewing the appeal of the Petitioners cited the Seventh Circuit case of *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1075-76 (7th Cir. 1999), which held that, "[t]he defendant must show the offer was more favorable than the judgment and the mandatory cost-shifting provision was therefore triggered." (Pet., App. A at 32a). The Sixth Circuit in reviewing the offers made found that the Rule 68 offers were not void for vagueness and that the ". . . offers were sufficiently definite to create the power of acceptance in the firefighters, triggering the mandatory application of Rule 68." (Pet., App. A at 35a).

The purpose of Rule 68 is to force plaintiffs to "think very hard" before proceeding with their particular lawsuits and to encourage settlement by exposing the plaintiffs to the possible award of costs should plaintiffs err in their evaluation of their case. The Petitioners in this case erred in the valuation of their case, and the Sixth Circuit determined that they should not profit upon their failure to accept the Rule 68 Offers made. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 295 (6th Cir. 1989).

The Rule 68 holding by the Sixth Circuit is not a novel concept or change in the law. It merely reiterates this Court's decision in *Marek v. Chesny* and needs no further revision.

IV.

PETITIONERS' ARGUMENT IN FAVOR OF THE APPLICATION OF THE CONTINUING VIOLATIONS DOCTRINE IS WITHOUT MERIT

It should be noted from the outset that the continuing violation doctrine espoused by Petitioners is being advanced merely to enable the claims of the Petitioners being transferred to escape being barred by the statute of limitations so that attorney fees can be recovered. The District Court found these claims to be barred by the statute of limitations, and the Sixth Circuit merely affirmed the District Court's finding that those claims were not timely filed. The law is unquestioned that there is a one year statute of limitations in civil rights cases in Tennessee. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984); Tenn. Code Ann. § 28-3-104(a)(3); *Berndt v. State of Tennessee*, 796 F.2d 879, 883 (6th Cir. 1986). The Sixth Circuit in the *Sharpe* Opinion stated, "in an effort to sidestep the one year statute of limitations, the plaintiffs argued for application of the 'continuing violation' doctrine in such a way to toll the limitations period, rendering the transfer claims timely." (Pet., App. A at 11). The Sixth Circuit Opinion clearly relies on this Court's decision in the *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2070 (2002), quoting with approval that "when an employee seeks redress for discrete acts of discrimination or retaliation, the continuing violation doctrine may not be invoked to allow recovery for acts that occurred outside the filing." This Court in *Morgan* went on to say:

> Discrete acts such as termination, failure to promote, denial of transfer or refusal to hire are

> easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice."

Id. at 2072. In contrast, a claim of hostile work environment involves a type of claim of unlawful employment practices which cannot be said to occur on any particular day, but occur over a series of days or years.

In reaching its Opinion, the Sixth Circuit not only considers the rulings of this Court in *Morgan* but also cites *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) and *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-95 (1982). The Sixth Circuit in its Opinion went on to specifically discuss discrete acts versus hostile work environment. A review of plaintiffs' argument does not reveal a citation to any act or conduct which would support Petitioners' position. No greater evidence of the weakness in Petitioners' argument exists than the very desperate (and completely inappropriate) references to matters not properly in the record of the proceedings. Four firemen in this case were transferred on September 26 or 27 of 1995. Within five (5) days of the transfer, all four (4) plaintiffs each filed civil service grievances, some alleging a violation of their constitutional rights. Petitioners even hired their attorney within days after the transfer. A lawsuit was filed by the Petitioners more than one year later on the date of October 24, 1996. There should be no question that persons of reasonable minds could not differ in that these individuals had reason to know of the claimed injuries caused by the discrete act of transfer for more than a year before they filed the lawsuit. The trial judge ruled and dismissed the transfer claims based on the statute of limitations. That finding was upheld by the Sixth Circuit. Petitioners' claim regarding a continuing violation should be dismissed.

V.

THE SIXTH CIRCUIT RULING DOES NOT CONFLICT WITH *ELROD v. BURNS*

Petitioners' transparent attempt to grab this Court's attention by arguing about a powerless federal court system, the improper application of Rule 68, and continuing violations, raises matters that do not conflict with the Constitution, federal statutes, case law, or the federal rules. Plaintiffs' contentions are meritless. The Sixth Circuit recognized clearly that Petitioners were merely trying to sidestep the one year Tennessee statute of limitations by invoking the continuing violation doctrine in an effort to avoid the effects of having grossly overvalued their claims after rejecting Rule 68 Offers made at the outset of the case. The Sixth Circuit examined the continuing violation theory as advanced by the Petitioners regarding this Court's opinion in *National Railroad Passenger Corp. v. Morgan*, 122 S. Ct. 2061. The Court in reviewing the *Morgan* case followed this Court's decision regarding discrete discriminatory acts and hostile environment claims. The Sixth Circuit held that they could find, "[N]o principled basis upon which to restrict *Morgan* to Title VII claims, and we therefore conclude that the Supreme Court's reasoning must be applied to the firefighter's § 1983 claims." (Pet., App. A at 16a). The Sixth Circuit recently found *Morgan's* construction of the continuing violation doctrine equally applicable to claims of age discrimination and retaliation brought under the Age Discrimination and Employment Act. *Sherman v. Chrysler Corp.* No. 00-2287, 2002 WL 31074591 (6th Cir., Sep. 16, 2002). The Sixth Circuit fully and completely examined the proof and facts involving the firefighters' claims regarding retaliatory transfers. The Sixth Circuit and the trial court agreed that such actions were barred by the statute of limitations in this case.

Obviously, courts are powerless to provide remedies to plaintiffs who do not timely present and perfect their claims. This does not, however, equate to a federal judiciary powerless to otherwise redress true constitutional claims. Petitioners in this case purely and simply did not timely file their transfer lawsuits in order to perfect their constitutional claims.

There is no conflict with *Elrod v. Burns*, 427 U.S. 347 (1976) in this action. The issue as to the transfers was presented to the jury by the trial court. It was after a jury verdict that the Court dismissed the transfer claims brought pursuant to *Elrod v. Burns* because the Petitioners failed to timely file their lawsuit.

VI.

THIS CASE DOES NOT HAVE FAR REACHING IMPLICATIONS OR PRESENT UNSETTLED QUESTIONS OF FEDERAL LAW

Petitioners claims and arguments about Rule 68 and the continuing violation doctrine do not present unique or novel issues nor do they invoke unsettled questions of federal law. To the contrary, the Sixth Circuit relied upon well-settled law as established by this Court's prior decisions. Contrary to having far reaching implications, Petitioners' claims are no more than a vain attempt to recover unwarranted attorney fees resulting from a failure to timely file certain claims and to properly value their case. It is no more complicated or far reaching that that reality.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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